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Office of The Attorney General
State of Connecticut

March 15, 1995

Mr. William Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-106

Dear Mr. Caton:

Please find enclosed for filing an original and four copies of the Reply Comments of the Connecticut Department of Public Utility Control in the above-referenced docket.

Should there be any questions on this matter, please contact the undersigned.

Sincerely yours,

Mark F. Kohler
Assistant Attorney General

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	:	
	:	
Petition of the Connecticut Department of	:	
Public Utility Control to Retain Regulatory	:	PR File No. 94-106
Control of the Rates of Wholesale Cellular	:	
Providers in the State of Connecticut	:	March 15, 1995

REPLY COMMENTS OF
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

Pursuant to the Commission's Order released February 24, 1995 in the above-referenced matter, the Connecticut Department of Public Utility Control (the "Department") respectfully submits this supplemental reply in connection with the confidential materials submitted by the Department on January 20, 1995. As demonstrated below, the Department's Petition to retain regulatory authority over wholesale cellular rates in Connecticut is well supported by the evidence pertaining to the conditions in Connecticut, and the Petition should accordingly be granted.

The Department emphasizes at the outset that, while the two wholesale carriers in Connecticut have opposed the Department's Petition, both the public parties -- the Attorney General of Connecticut and the Connecticut Office of Consumer Counsel -- as well as the independent resellers in Connecticut have and continue to strongly support the Department's request for continued regulatory authority. See Supplemental Comments of Connecticut Telephone and Communications Systems, Inc. and Connecticut Mobilcom, Inc., dated March

10, 1995; Comments of the Attorney General of the State of Connecticut, dated March 9, 1995. The Department takes this opportunity to reply to the comments that have been filed pursuant to the Commission's February 24, 1995 Order.

I. THE COMMISSION SHOULD DEFER TO THE EVIDENTIARY FINDINGS OF THE DEPARTMENT MADE AFTER HAVING CONDUCTED AN EXTENSIVE INVESTIGATION INTO THE WHOLESALE CELLULAR MARKET IN CONNECTICUT.

In determining whether to petition the Commission for continued regulatory authority over wholesale cellular prices, the Department initiated a special docket in which it intended to conduct an investigation into the Connecticut market and to evaluate whether the conditions for continued regulation established by Congress and the Commission were present. As part of its investigation, the Department held seven days of pubic hearings, during which it took the testimony of numerous witnesses and reviewed extensive documentary evidence. All parties and intervenors were afforded the opportunity to submit evidence and witnesses, conduct cross-examination, file briefs and present oral argument.

After considering the credibility of the oral testimony and written evidence, the Department concluded, in a detailed Decision dated August 8, 1994 (the "Decision") submitted with its Petition to the Commission, that the evidence obtained in the hearings established quite clearly that market conditions in Connecticut do not justify the end of regulation at this time. Instead, the Department found that the evidence showed that, while the entry of new service providers will likely improve the level of competition in the Connecticut market, their entry has not yet occurred, and effective competition is not yet a

reality ion Connecticut. Decision, at 31-32. Accordingly, the Department determined that the most appropriate course was to petition the Commission for continued regulatory authority.

That request, however, is limited in scope. Consistent with recently enacted legislation in the form of Conn. Public Act 94-83, which is aimed at promoting effective competition in telecommunications services in Connecticut generally, the Department has crafted its request for continued authority to promote the transition to competition in the cellular market. Specifically, the Department seeks only to retain regulatory authority until it conducts a further review of conditions in Connecticut in July, 1996, and, if that further review reveals that effective competition has not been achieved, the Department requests permission to retain authority to regulate until October 1, 1997. The limited nature of the Department's request is predicated on its findings that effective competition has not yet been reached, and an additional period of transitional regulation is necessary to assure that the full benefits of effective competition are not lost because of the anti-competitive and abusive practices that are likely to ensue in the absence of regulation during such period. Thus, the Department's request is consistent both with Connecticut state policy on the promotion of competition in the telecommunications field and with congressional intent in the enactment of the Omnibus Budget Reconciliation Act of 1993 to advance fully and effectively competitive markets in the cellular industry.

In light of the nature of the hearings conducted by the Department and the limited scope of its request to retain regulatory authority, the Department respectfully maintains that the Commission ought to apply a deferential standard in reviewing the Department's Petition.

The evidence submitted by the Department in support of its Petition is the product of a broad-ranging hearing process, in which the parties were afforded a full opportunity to provide relevant evidence to the Department and to challenge the credibility and substantiality of the evidence. The Department took live testimony and had the chance to evaluate the credibility of the witnesses offered by all the parties.

Thus, the decision to file a petition with the Commission was not undertaken lightly. Rather, it was the result of a careful process of deliberation in which all parties had a full and fair opportunity to participate. Under the circumstances, the Department maintains that its factual findings that conditions of effective competition do not yet exist in the Connecticut cellular market should be accepted if supported by substantial record evidence. Because the Department's findings are amply supported by the record evidence, the Commission should defer to those findings.

II. THE EVIDENCE SUBMITTED IN SUPPORT OF THE DEPARTMENT'S PETITION SUPPORTS AND JUSTIFIES THE REQUEST FOR CONTINUED, BUT LIMITED REGULATORY AUTHORITY OVER CELLULAR RATES.

In support of its Petition, the Department submitted the entire record developed in the hearings it conducted in its investigation of the Connecticut cellular market. A review of the record, including those materials that are subject to the Commission's Protective Order, demonstrates that the Department's findings are well-supported and that its Petition should be granted.

Although the Department was permitted "to submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for

CMRS subscribers in the state," Second Report and Order, at para. 252, the Department conducted its investigation and specifically crafted its findings to the eight factors the Commission established as relevant to the question whether continued regulation would be justified. See Decision, at 2-3, 6. The Decision details the Department's findings as to each of these factors and describes the supporting evidence. Several of these findings, particularly those supported by evidence included in the confidential materials, deserve emphasis.

First, the evidence is compelling that, as the Department found, there are no substitutable services available in Connecticut at this time. Decision, at 17-18. The wholesale cellular market is one which is dominated by two providers -- Springwich Cellular Limited Partnership ("Springwich") and Bell Atlantic Metro Mobile ("BAMM") (collectively, the "Carriers"). In contrast to the market dominance of the Carriers, there is presently a near complete absence of existing substitute services in Connecticut. Despite the Carriers' contentions to the contrary, the plain fact is that paging and SMR services are not substitutes for cellular services because of the lack of interconnection with the public switched network. Moreover, paging services do not offer two-way voice communications. See Transcript, at 329, 816, 856, 870; Reseller's Response to TE-11. Given the limitations on these services, they cannot be considered as viable substitutes for cellular.

Similarly, ESMR and PCS are not substitute services for cellular in Connecticut at present. The evidence, including that offered by the Carriers themselves, indicates that these services are not available in Connecticut yet and will not have any significant competitive impact on the Connecticut market until 1996 at the earliest. See BAMM Response to

Interrogatory TE-12; Late File Exhibit 3. Indeed, recent developments involving Nextel indicate that the Carriers' predictions of competition from Nextel was overly optimistic. See Supplemental Comments of the Connecticut Department of Public Utility Control, dated Jan. 11, 1995, at 1-2. Until the future entry of ESMR and PCS providers into the Connecticut market, however, competition in the cellular market is virtually nonexistent. See Tr. at 157; BAMM Response to Interrogatory TE-12; Resellers' Response to Interrogatory TE-12.

The evidence that substitutes are not yet available is particularly significant when coupled with the evidence relating to the Carriers' rates. Again, the Carriers' own witnesses testified that the principal pressure to reduce rates will be the entrance of new competitive services and that rates would fall substantially with the entrance of ESMR and PCS. See, e.g., Transcript, at 53-55, 489, 681-85, 1214-15, 1541-52; Late File Exhibit 3. The evidence is, for Connecticut, that these services will not create a competitive environment until 1996 at the very earliest. In the meantime, the lack of available substitutes and the existing barriers to entrance create market conditions in Connecticut that do not impose sufficient competitive pressures to force the Carriers' wholesale prices down.

It is on the basis of this evidence in particular that the Department crafted their limited request to continue its regulatory authority over cellular wholesale rates in Connecticut. As the evidence demonstrated that sources of effective competition did not yet exist in Connecticut, but, with the expected entry of ESMR and PCS providers, appeared likely to develop perhaps as early as 1996, the Department sought to extend its regulation until 1996, at which time it would investigate the status of the competitive market. This limited request is

therefore entirely in line with the evidence about the nature and future of the Connecticut market.

The history of the Carriers' rates also is instructive. There has been little significant reduction in the Carriers' wholesale prices, see Springwich Response to Interrogatory TE-17-11, Attachment B, and what reductions that have occurred have been made on the eve or during proceedings before the Department to deregulate wholesale cellular rates. See Transcript, at 455-56, 461; BAMM's Response to Interrogatory TE-2. These reductions reflect not the prospect of competitive market forces but rather the prospect of achieving the premature elimination of regulation.

Moreover, the Department found that, while the record reflected that the Carriers had conducted several promotions since 1987, the evidence was clear that the beneficiaries of these promotions were the Carriers' retail affiliates. Because of the Carriers' tiered pricing structures, their retail affiliates are able to obtain lower wholesale rates than the smaller independent resellers. Decision, at 13; see Springwich Responses to Interrogatories TE-17-02, TE-17-05; BAMM Responses to Interrogatories TE-2 and TE-17. Thus, the Department properly concluded that the existing level of competition was not producing just and reasonable rates; instead, it was resulting in pricing benefits that extended principally to the Carriers' retail affiliates and not to unaffiliated resellers.[1]

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[1] In reviewing the evidence relating to the Carriers' rates of return, the Department found that the record on the issue was inconclusive and speculative and that further investigation was warranted. See Decision at 10-11; Late File Exhibits 3, 4, 38, 39, 40, 41. Ironically, before the Commission the Carriers attempt to use the lack of a finding about rate of return against the Department. This attempt should be rejected. First, the Department's determination on rate of return was the result of the inadequate evidence offered by the Carriers. Moreover,

Finally, the Department found significant evidence of anti-competitive and discriminatory practices on the part of the Carriers in Connecticut. Indeed, in light of the substantial evidence developed at the Department's hearings that the Carriers have been engaged in anti-competitive practices, the Department determined that further investigation into such practices was warranted. Decision, at 27-28. In particular, the Department found that the relationship between the Carriers and their retail affiliates creates the foundation for the Carriers to engage in anti-competitive practices, which, in the absence of regulation or effective competition, would go entirely unchecked. Id. at 26-27. The evidence showed that, because of the common management of the Carriers and their retail affiliates, the retail affiliates are able to obtain advance notice of the Carriers' wholesale pricing plans and strategies as well as access to market plans and strategies of the unaffiliated resellers that they are required to provide to the Carriers. Transcript, at 807-14, 1007-09, 1705-09. This access to information permits the Carriers' retail affiliates an unfair and anti-competitive advantage.

Moreover, the common management of the Carriers and their retail affiliates permits them to engage in a pricing strategy that acts to the direct discriminatory disadvantage of the independent resellers. Specifically, the Carriers' tiered pricing structures permit the Carriers' retail affiliates to offer rate plans at a lower cost to retail customers than the rate charged to the independent resellers for wholesale bulk service. Transcript, at 168-72, 282-83. As the Department stated, "this benefit results from the economies of scale inherent in the Springwich and BAMM tiered pricing structures. Nevertheless, the great disparity between

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before the Department, the Carriers contended that the rate of return should not be a significant factor. See Transcript, at 609-10.

the rates and charges the independent resellers currently experience for bulk wholesale cellular service when compared to that experienced by [the Carriers'] retail affiliates requires further review." Decision, at 28. Accordingly, the Department intends to further investigate these questions as well as the other charges of anti-competitive behavior.

In addition to the evidence of anti-competitive practices resulting from the relationship between the Carriers and their retail affiliates, the Department's hearing produced evidence that the Carriers had engaged in numerous instances of misconduct and coercion in their relationships with the independent resellers. For instance, credible testimony was offered by several witnesses that the Carriers had on a regular basis inquired of and discussed with the resellers the latter's retail rates and pricing plans, at times complaining that a reseller's rates were too low or indicating that the resellers could not compete for certain customers. See Transcript, at 805-07, 1007-08, 1057-58. In the absence of regulation and until such time as sufficient competitive conditions actually develop, the Carriers will be largely free to engage in similar and further abusive practices.

In sum, the market conditions in Connecticut "fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A). These conditions are likely to change in the not too distant future with the entry of ESMR and PCS providers. However, conditions of competition sufficient to ensure just and reasonable rates do not exist at present in Connecticut, and in the meantime, the Department should be permitted to retain its regulatory authority over wholesale cellular rates to ensure a transition to a truly competitive market.

CONCLUSION

The Department conducted a thorough and complete investigation into the conditions of the wholesale cellular market in Connecticut. All the parties were afforded an opportunity to present and contest evidence. The result of the Department's seven days of hearings is an extensive factual record that strongly supports the findings and conclusions reached by the Department that continued regulation of wholesale cellular rates in Connecticut is mandated. Given the deliberate and thorough nature of the Department's investigation and the substantial evidence existing on the record in support of the Department's Petition, the Department respectfully maintains that the Commission should defer to the Department's determination.

For the foregoing reasons, the Department requests that the Commission grant its Petition to retain regulatory authority.

CONNECTICUT DEPARTMENT OF
PUBLIC UTILITY CONTROL

RICHARD BLUMENTHAL
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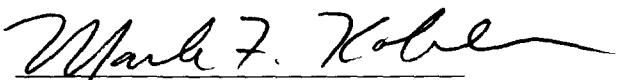
Its Attorney

By: 

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CERTIFICATE OF SERVICE

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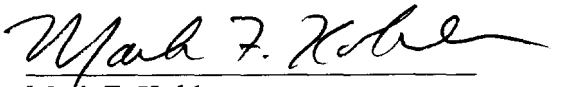

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